



Federal Communications Commission  
Washington, DC 20554

International Bureau

DA 05-354

February 17, 2005

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Re: Spectrum Five LLC Petition for Declaratory Ruling To Serve the U.S. Market from the 114.5° W.L. Orbital Location, File No. SAT-LOI-20041228-00228, Call Sign S2649 ("Petition").

Dear Mr. Stansbury:

On December 28, 2004, Spectrum Five LLC ("Spectrum Five") filed the above-captioned Petition for Declaratory Ruling requesting authority to provide Direct Broadcast Satellite ("DBS") service to the U.S. market through two Netherlands-authorized satellites at the 114.5° W.L. orbital location using the 12.2-12.7 GHz (downlink) and the 17.3-17.8 GHz (feeder link) frequency bands.<sup>1</sup> Subsequently, on February 2, 2005, Spectrum Five submitted a letter requesting that its Petition be held in abeyance until February 18, 2005, when it would submit additional information.<sup>2</sup> As explained below, we deny Spectrum Five's request that its Petition be held in abeyance and, accordingly, dismiss the Petition as defective without prejudice to refiling.

Section 25.114(c) of the Commission's rules<sup>3</sup> requires all space station applicants to submit all applicable items of information listed in its subsections. In the *First Space Station Reform Order*,<sup>4</sup> the Commission affirmed the policies embodied in this rule by continuing to require applications to be substantially complete when filed.<sup>5</sup> The Commission also emphasized that non-U.S.-licensed satellite operators, such as Spectrum Five, seeking access to the U.S. market will be required to provide the same information regarding the foreign satellites as U.S. satellite license applicants provide for proposed U.S.

<sup>1</sup> Spectrum Five Petition.

<sup>2</sup> Letter from Todd M. Stansbury, Esq., Counsel for Spectrum Five LLC, to Marlene H. Dortch, Secretary, Federal Communications, dated February 2, 2005 (Spectrum Five February 2, 2005 letter).

<sup>3</sup> 47 C.F.R. § 25.114(c).

<sup>4</sup> Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10852 ¶ 244 (2003) (*First Space Station Reform Order*); International Bureau to Streamline Satellite and Earth Station Processing, *Public Notice*, Report No. SPB-140, October 28, 1998 (emphasizing the obligation to comply with 47 C.F.R. § 24.114(c) and stating that applications that did not comply would be dismissed). Since the *First Space Station Reform Order* was adopted, the Bureau has strictly enforced its Part 25 rules and has returned over 20 applications as defective. See Echostar Satellite LLC, Application for Authority to Construct, Launch and Operate a Geostationary Satellite in the Fixed Satellite Service Using the Extended Ku-Band Frequencies at the 101° W.L. Orbital Location, *Order on Reconsideration*, DA 04-4056, ¶ 14 (rel. Dec. 27, 2004) (contains a partial listing of dismissed applications).

<sup>5</sup> *First Space Station Reform Order*, 18 FCC Rcd at 10852 ¶ 244 (citing Amendment of the Commission's Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking*, 17 FCC Rcd at 3875 (para. 84) (2002)).

satellites.<sup>6</sup> As the Commission noted, these procedures and rules will enable it to establish satellite licensees' operating rights clearly and quickly and, as a result, allow licensees to provide service to the public much sooner than might be possible under the previous licensing procedures.<sup>7</sup> More recently, on January 28, 2004, the International Bureau issued a Public Notice reminding DBS applicants that if a DBS application fails to include any of the information required under Section 25.114 of the Commission's rules, it would return the application without prejudice to refiling as being unacceptable for filing.<sup>8</sup>

*Deficiencies in the Petition.* Spectrum Five's Petition did not include all the information required under Section 25.114. Specifically, Section 25.114(d)(13)(i) requires a "sufficient technical showing that the proposed systems could operate satisfactorily if all assignments in the Broadcasting-Satellite Service ("BSS") and feeder link Plans were implemented."<sup>9</sup> Spectrum Five did not include any showing pursuant to Section 25.114(d)(13)(i) and instead indicated that such information would be provided in the future.<sup>10</sup> Similarly, Section 25.114(d)(13)(ii) requires "analyses of the proposed systems with respect to the limits in Annex 1 to Appendices 30 and 30A of the International Telecommunication Union ("ITU") Radio Regulations."<sup>11</sup> Again, Spectrum Five did not include any information pursuant to Section 25.114(d)(13)(ii) and instead indicated that such information would be provided in the future.<sup>12</sup>

*Waiver Request/Request to Hold in Abeyance.* Spectrum Five's Petition contained a generic request for a waiver of any applicable Part 25 rules to the extent that the Commission finds that any additional information not already provided in its Petition is needed.<sup>13</sup> In addition, in its letter of February 2, 2005, Spectrum Five requests the Commission to hold the Petition in abeyance until Spectrum Five submits additional technical information. In the February 2, 2005 letter, Spectrum Five suggests that its

<sup>6</sup> *Id.*, 18 FCC Rcd at 10872 ¶ 300.

<sup>7</sup> *First Space Station Reform Order*, 18 FCC Rcd at 10765-66 ¶ 4.

<sup>8</sup> See International Bureau Clarifies Direct Broadcast Satellite Space Station Application Processing Rules, *Public Notice*, Report No. SPB-198, 19 FCC Rcd 1346 (2004). Two years earlier, the Commission incorporated the DBS service rules into Part 25 of the Commission's rules. Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, IB Docket No. 98-21, 17 FCC Rcd 11331 (2002) (*Part 100 R&O*). In that Order, the Commission stated that DBS applicants would be required to provide the information requested by Form 312 and to follow all relevant Part 25 procedures. *Id.*, 17 FCC Rcd at 11350 ¶ 36.

<sup>9</sup> 25 C.F.R. § 25.114(d)(13)(i).

<sup>10</sup> Spectrum Five Petition, Attachment A, page 18 ("25.114(d)(13)(i). The information requested in Appendix 4 of the ITU's Radio Regulations Showing that the proposed system could operate satisfactorily if all assignments in the BSS and feeder link Plans were implemented. To be provided.")

<sup>11</sup> 25 C.F.R. § 25.114(d)(13)(ii).

<sup>12</sup> Spectrum Five Petition, Attachment A, page 19 ("25.114(d)(13)(ii) - Analyses of the proposed system with respect to the limits in Annex 1 to Appendices 30 and 30A. - To be provided.")

<sup>13</sup> Spectrum Five Petition, Response to Question 35 (stating that Spectrum Five "has provided all information regarding its proposed satellite system that is reasonably available at this time. Some of the requested information, however, can only be accurately determined after the selection of a satellite manufacturer through the process of entering into a binding non-contingent contract under Section 25.148 of the Commission's rules. Spectrum Five will supplement and/or amend this Petition or request a modification to its authorization when this information becomes available.") Spectrum Five did not make any attempt to state with particularity the specific rules that should be waived.

failure to include all the information required by our rules was based upon advice from Commission staff.<sup>14</sup>

The Commission may grant a waiver for good cause shown.<sup>15</sup> Waiver is appropriate if (1) special circumstances warrant a deviation from the general rule, and (2) such deviation would better serve the public interest than would strict adherence to the general rule.<sup>16</sup> Generally, the Commission may grant a waiver of its rules in a particular case only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.<sup>17</sup> Spectrum Five states that a waiver is in the public interest because it will permit Spectrum Five to secure the best possible design for its satellite without prejudicing the procurement process, and that some of the information required by the Commission's rules can only be accurately determined after the selection of a satellite manufacturer. Spectrum Five's statement appears to be inconsistent with its application. Spectrum Five has, in fact, provided the details of its satellite design. What it has not provided are the analyses required by Section 25.114(d)(13) of the Commission's rules. Such analyses would be based upon the design details that Spectrum Five has supplied in its Petition. Further, these analyses are needed to enable us to determine whether Spectrum Five's satellites can operate compatibly with BSS satellites operating in accordance with the BSS plan. Thus, we deny Spectrum Five's waiver request.

Spectrum Five's February 2, 2005 letter did not provide any additional argument or analysis regarding why the informational showing required under 25.114(d) should be waived or postponed. Instead, Spectrum Five appears to suggest that its failure to file a complete Petition is based upon staff advice.<sup>18</sup> It is well established that parties may not rely upon staff advice to excuse a failure to comply with Commission rules.<sup>19</sup> Consequently, we deny the waiver request and find that Spectrum Five's Petition, File No. SAT-LOI-20041228-00228, is defective and will be dismissed without prejudice to refile.

*Other Issues Raised by Spectrum Five's Petition.* While we dismiss the application on the above basis, we take this opportunity to apprise Spectrum Five of other concerns we have regarding its compliance with Sections 25.148 and 25.210 of the Commission's rules should Spectrum Five choose to

<sup>14</sup> Spectrum Five February 2, 2005 letter (stating that "based upon conversation with the Commission's staff, Spectrum Five also noted in the Petition that certain additional technical information would subsequently be provided.").

<sup>15</sup> 47 C.F.R. § 1.3. See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

<sup>16</sup> See *Northeast Cellular*, 897 F.2d at 1166.

<sup>17</sup> See *WAIT Radio*, 418 F.2d at 1157.

<sup>18</sup> See note 14 above.

<sup>19</sup> See Mary Ann Salvatiello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4707-8 ¶ 22 (1991) (citing *Office of Personnel Management v. Richmond*, 497 U.S. 1046 (1990), which held that Commission precedent establishes that where a party has received erroneous advice, the government is not estopped from enforcing its rules in a manner that is inconsistent with the advice provided by the employee, particularly where relief is contrary to a rule); see also Request for Request by San Benito Literacy Center, *Order*, 17 FCC Rcd 12049, 12051 ¶¶ 9-10 (2002) (holding that an applicant's claim of receiving incorrect oral advice from the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), which the applicant claims resulted in its missing a filing deadline, is insufficient to merit a waiver of the Commission's rules, nor is a denial of a request for waiver based upon such circumstances arbitrary given the fact that the deadline was announced and established by the SLD).



refile the Petition. Section 25.148(f) of the Commission's rules requires that "DBS operations must be in accordance with the sharing criteria and technical characteristics contained in Appendices 30 and 30A of the ITU Radio Regulations. Operation of systems using differing technical characteristics may be permitted, with adequate technical showing, and if a request has been made to the ITU to modify the appropriate Plans to include the system's technical parameters." The Netherlands Administration has apparently filed a proposed Region 2 Plan<sup>20</sup> modification with the ITU Radiocommunication Bureau ("ITU/BR") as "SF BSS5"<sup>21</sup> on behalf of Spectrum Five.<sup>22</sup> The Petition, however, does not demonstrate that the two space stations, Spectrum IA and Spectrum IB, could operate in accordance with the sharing criteria and technical characteristics contained in Appendices 30 and 30A.<sup>23</sup> In fact, a preliminary analysis of the system design indicates that the proposed system will significantly exceed the threshold change in overall equivalent protection margin ("delta- OEPM")<sup>24</sup> that triggers the agreement-seeking process under the ITU Appendix 30, Annex 1. This issue should be addressed in any refiled petition. The petition should address whether coordination with potentially-affected Administrations has been successfully completed, or should supply technical analyses demonstrating that the system's impact other frequency assignments in the Region 2 Plan and any proposed modifications to the Region 2 Plan that have been received by the ITU/BR is negligible.<sup>25</sup>

Section 25.210(c) of the Commission's rules requires a minimum capability to change transponder saturation flux densities by ground command in 4 dB steps over a range of 12 dB.<sup>26</sup> Spectrum Five's Schedule S application indicates that the maximum input attenuator value is 10 dB. Thus, it appears that Spectrum Five has not demonstrated compliance with Section 25.210(c).

*Orbital Debris.* Additionally, we remind Spectrum Five of the Commission's recent decision to amend the Part 25 satellite rules to adopt new rules concerning mitigation of orbital debris.<sup>27</sup> These rules require applicants for space stations to submit a description of design and operational strategies they will use to mitigate orbital debris, including a statement assessing the risk of collision with co-located satellites, and detailing post-mission disposal plans. We note that since these rules may become effective in the near future, Spectrum Five may wish to consider providing this information in connection with any refiled.

<sup>20</sup> The Region 2 Plan is the Plan for the broadcasting-satellite service in Region 2 in the frequency band 12.2-12.7 GHz and the associated feeder links in the frequency band 17.3-17.8 GHz contained in Appendices 30 and 30A of the ITU Radio Regulations.

<sup>21</sup> "SF BSS5" is the ITU designator for the ITU filing associated with Spectrum Five's Spectrum IA and Spectrum IB space stations. Spectrum Five refers to this filing as "BSS5" in its application.

<sup>22</sup> See ITU BR International Frequency Information Circular ("IFIC") No. 2533, dated November 30, 2004, Space Services, Space Plans Appendix 30/30A, List of Pending GSO BSS Space Stations.

<sup>23</sup> See 47 C.F.R. § 25.148(f).

<sup>24</sup> ITU Radio Regulations, Appendix 30, Annex 5, Section 1.11.

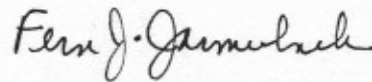
<sup>25</sup> See *Part 100 R&O*, 17 FCC Rcd at 11381 ¶ 108.

<sup>26</sup> 47 C.F.R. § 25.210(c). Feeder links for DBS space stations operate in the fixed-satellite service.

<sup>27</sup> Mitigation of Orbital Debris, *Second Report and Order*, IB Docket Number 02-54, 19 FCC Rcd 11567 (2004). The Commission specifically concluded that the "public interest is served by requiring entities that request a Commission ruling for access to a non-U.S.- licensed space station to serve the U.S. market to submit the same information concerning the orbital debris mitigation plans of the non-U.S.-licensed space station as that submitted by U.S.-licensed space stations." *Id.* at para 93-97.

We find that Spectrum Five's Petition, File No. SAT-LOI-20041228-00228, is defective. Pursuant to the Commission's rules on delegated authority, 47 C.F.R. § 0.261(a)(4), we therefore DENY the waiver request and DISMISS the Petition without prejudice to refiling.

Sincerely,



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